



AIR-CONDITIONING
& REFRIGERATION
INSTITUTE

Representing Manufacturers
of Heating, Ventilating,
Air-Conditioning and
Refrigeration Products

Via Federal Express

September 29, 2003

CALIFORNIA ENERGY COMMISSION
Attention: Docket No. 03-BSTD-1
Dockets Office
1516 Ninth Street, MS-4
Sacramento, CA 95814

03- BSTD-1

CALIF ENERGY COMMISSION

SEP 30 2003

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Dear Mr. Bryan Alcorn:

Attached for filing with the California Energy Commission are the comments of the Air-Conditioning and Refrigeration Institute, the Gas Appliance Manufacturers Association, the Association of Home Appliance Manufacturers and the National Electrical Manufacturers Association regarding the CEC's 2005 Building Standards Rulemaking, Docket #03-BSTD-1. The comments are provided in both hardcopy and electronic (pdf) formats.

Stephen Yurek

A handwritten signature in black ink, appearing to read "Stephen Yurek", with a long horizontal line extending to the right.

General Counsel
Air-Conditioning and Refrigeration Institute

State of California

**ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

Revisions to the California Building Energy)
Efficiency Standards, California Code of)
Regulations, Title 24, Part 1 and Part 6)

Docket No. #03-BSTD-1

**COMMENTS OF
THE AIR-CONDITIONING AND REFRIGERATION INSTITUTE,
GAS APPLIANCE MANUFACTURERS ASSOCIATION,
ASSOCIATION OF HOME APPLIANCE MANUFACTURERS, AND
NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION
TO THE CALIFORNIA ENERGY RESOURCES CONSERVATION AND
DEVELOPMENT COMMISSION ON
PROPOSED AMENDMENTS TO
TITLE 24 – CALIFORNIA ENERGY CODE**

September 26, 2003

The Air-Conditioning and Refrigeration Institute (ARI), Gas Appliance Manufacturers Association (GAMA), Association of Home Appliance Manufacturers (AHAM), and National Electrical Manufacturers Association (NEMA) submit this statement on the proposed revisions by the California Energy Resources Conservation and Development Commission (CEC) to the California Building Energy Efficiency Standards, California Code of Regulations, Title 24, Part 1 and Part 6.¹ We look forward to the further opportunity to work with the CEC toward the development of a reasonable and lawful program. These comments are presented without prejudice to the positions set forth in greater detail by these associations in their litigation against the CEC².

¹ Express Terms – 45 Day Language to Title 24, California Code of Regulations, Part 1 and 6.

² *Air-Conditioning and Refrigeration Institute, et al. v. Energy Resources Conservation and Development Commission*, E.D. Cal. No. CIV S 02-2437 WBS PAN.

On November 7, 2002, ARI, GAMA, AHAM, and NEMA filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Eastern District of California challenging portions of the CEC's appliance efficiency regulations.³ On June 11, 2003, the District Court issued a permanent injunction enjoining the CEC from enforcing its information filing, marking, enforcement, and pre-market approval provisions against federally covered products and covered equipment as defined under the Energy Policy and Conservation Act (EPCA)⁴. A copy of the Court's orders are attached and filed with these comments as Attachment 1.

Federal Preemption

The rules regarding federal pre-emption are different depending upon whether the appliance is for residential or commercial use. The pre-emption provisions for residential (covered products) and commercial (covered equipment) installations are outlined below:

Residential

There is no blanket exception from preemption for building codes but a limited exception for performance-based building codes that meet all of the requirements of 42 U.S.C. §6297(f)(3). The purpose of 42 U.S.C. §6297(f)(3) is to allow state performance-based building codes to provide an option to consumers to select a higher efficiency covered product as a one-to-one

³ *Air-Conditioning and Refrigeration Institute, et al. v. Energy Resources Conservation and Development Commission*, E.D. Cal. No. CIV S 02-2437 WBS PAN.

⁴ Energy Policy and Conservation Act (EPCA), Pub. L. 94-163, 89 Stat. 926 (1975) (EPCA), as amended by, *inter alia*, the National Appliance Energy Conservation Act of 1987, Pub. L. 100-12, 101 Stat. 103 (NAECA) (codified at 42 U.S.C. § 6291 *et seq.*) and the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (EPACT) (codified at 42 U.S.C. § 6311 *et seq.*).

energy usage trade off with another energy-impacting product or application. The exception from federal preemption allows state performance-based building codes to exist without being totally preempted by 42 U.S.C. §6297(c); however, the exception from federal preemption provided by 42 U.S.C. §6297(f)(3) does not apply to testing, information filing and labeling requirements, which are expressly preempted under 42 U.S.C. §6297(a).

For residential applications, this means the CEC could give a residential consumer a "one-for-one" energy use credit for installing a more efficient air conditioner or water heater than the federal minimum energy efficiency standard as a trade-off for greater window area or other energy impacting application. It does not allow the CEC to require the testing, disclosure of information, or use of any measure of energy consumption or an energy descriptor for any covered product or covered equipment "other than that provided under section 6293 of this title"⁵ and "other than information required under section 6294 of this title."⁶

Commercial – Non-Residential

For commercial appliances, all state regulations including building codes regarding covered equipment are preempted on the effective date of a federal efficiency standard,⁷ except a state building code may adopt the minimum efficiency requirements of the current ASHRAE/IES Standard 90.1. However, the efficiency standard in the building code cannot take effect prior to the effective date of the applicable ASHRAE/IES Standard 90.1.⁸ As with the residential building code exception to preemption, the exception does not apply to testing, information

⁵ 42 U.S.C. §6297(a)(1)(A)

⁶ 42 U.S.C. §6297(a)(1)(B)

⁷ 42 U.S.C. §6216(b)(2)(A)

⁸ 42 U.S.C. §6316(b)(2)(B)

filing, and labeling, which are the sole domain of the DOE for covered equipment.⁹

Preempted Provisions in Title 24

The provisions in Title 24, Part 1 and 6 establishing testing procedures, information filing, and labeling requirements for covered products and equipment that must be met before a covered product or covered equipment can be installed in California are preempted by federal law. In particular, all references in Title 24 to compliance with Title 20 for covered products and covered equipment are preempted and the enforcement of those provisions through Title 24 are in direct conflict with the permanent injunction issued by the United States District Court for the Eastern District of California. Similarly, all references in Title 24 that covered products and equipment are regulated by Title 20 or Title 24, Part 6 are preempted and in direct conflict with the permanent injunction and with the preemption provisions of EPCA.

An example of a violation of the preemption provisions of EPCA and the Court's permanent injunction is: "Title 24, Part 6, limits the installation of the following manufactured devices to those that have been certified by their manufacturer to meet or exceed minimum specifications or efficiencies adopted by the commission. The certification status of any such manufactured device may be confirmed only by reference to:

1. A directory published or approved by the commission; or
2. A copy of the application for certification from the manufacturer and the letter of acceptance from the commission staff; or
3. Written confirmation from the publisher of a commission approved directory that a device has been certified; or
4. A commission approved label on the device."¹⁰

⁹ 42 U.S.C. §6316(a) and 42 U.S.C. §6316(b)

Another example of Title 24 violating the preemption provisions of EPCA and the District Court's order is: "Any appliance for which there is a California standard established in the Appliance Efficiency Regulations may be installed only if the manufacturer has certified to the commission, as specified in those regulations that the appliance complies with the applicable standard for that appliance. See Appendix 1-A for availability of directories of certified appliances."¹¹ The only directory referenced in Appendix 1-A is the CEC's certified appliance directory, which is created through the information filing provisions of Title 20 that the Court has enjoined the CEC from enforcing against covered products and covered equipment. The CEC is unlawfully attempting to resurrect the preempted and enjoined information filing, energy efficiency standards, testing procedures, pre-market approval, and certification provisions in Title 20 by mandating compliance with the provisions in Title 24 for all appliances installed in California. Failure to comply will result in the home or building not receiving a final occupancy permit.

As the Court has found, and we have stated throughout the CEC's rulemaking processes, the CEC's Title 20 regulations, as well as Title 24, Parts 1 and 6 regulations, as they apply to “covered products” and “covered equipment,” as defined under EPCA, are expressly preempted by federal law.

Despite EPCA’s express preemption of state regulations that set minimum efficiency standards, that regulate or enforce standards, or that require the disclosure of appliance and equipment information by labeling or other means, the CEC's Title 24 regulations involve the setting and enforcement of standards, and requirements for information filing and labeling of federally covered products and equipment that unlawfully invade the federal regulatory domain.

¹⁰ Title 24, Part 6, Section 100h

¹¹ Title 24, Part 6, Section 111

It is through Title 24 that the CEC is attempting to regulate the same appliances that EPCA and the District Court have stated are within the exclusive regulatory jurisdiction of the DOE and the Federal Trade Commission (FTC).

To remedy these violations, the CEC must:

1. Remove all references to Title 20 as it relates to covered products and covered equipment.
2. Remove all references to standards, testing procedures, energy efficiency descriptors, information filing, and certification requirements for covered products and covered equipment.
3. Specifically state that covered products and covered equipment that meet the federal energy efficiency requirements as represented by listing in trade association product directories, manufacturers' product information sheets, FTC labels, and information filings with the DOE and FTC can be installed in California.

* * * * *

We look forward to the opportunity to continue to work with the CEC to assure adoption of reasonable and lawful regulations.

Respectfully submitted,

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Joseph Mattingly
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